CHRISTOPHER C. SLONE
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-594 Decided May 23, 1990

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming issuance of cessation order No. 86-84-068-001. Hearings Division Docket No. NX-6-104-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

   The Secretary of the Interior through OSMRE properly has jurisdiction to issue cessation orders in states with approved programs where OSMRE acts as a result of an oversight inspection pursuant to sec. 521(a)(1) of SMCRA and 30 CFR 843.12(a)(2) after OSMRE issues a 10-day notice and the state fails to take appropriate action.

2. Estoppel--Surface Mining Control and Reclamation Act of 1977: Generally

   A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change his position for the worse.

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

   The doctrines of collateral estoppel and equitable estoppel will not preclude OSMRE from issuing its own cessation order in situations where a similar notice of violation and cessation order was issued and litigated by the state regulatory authority since the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

4. Constitutional Law: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review

   The Interior Board of Land Appeals is not the proper forum to decide constitutional issues.

5. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre--Surface Mining Control and Reclamation Act of 1977: Variances: Generally

   A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption.

APPEARANCES: James Bates, Esq., Hindman, Kentucky, for Christopher C. Slone; Paul A. Molinar, Esq., Office of the Solicitor, United States Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BYRNES

Christopher C. Slone (appellant) has appealed from a decision by Administrative Law Judge Frederick A. Miller, affirming issuance of cessation order (CO) No. 86-84-068-001 at appellant's surface mining site in Knott County, Kentucky.

Appellant conducted coal mining operations pursuant to a 2-acre or less surface disturbance permit issued by the Commonwealth of Kentucky on April 15, 1983 (Exh. R-1). This permit did not require compliance with the permanent program performance standards of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1982). 1/

On April 25, 1986, the Office of Surface Mining Reclamation and Enforcement (OSMRE) Inspector Lavern Rice visited appellant's minesite, conducted a field survey, prepared a sketch map, and calculated the disturbed area as 2.7298 acres (Tr. 13; Exh. R-2). The inspector issued a 10-day notice to the State citing a violation of Kentucky Revised Statutes

1/ Section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1982), had provided that SMCRA would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." This 2-acre exemption was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

(KRS) §§ 350.060 and 502(b) (30 U.S.C. § 1252(b) (1982)) of SMCRA for mining without a valid surface disturbance permit from the Commonwealth of Kentucky. The Commonwealth took no action on the 10-day notice because it had previously issued a citation for violation of KRS 350.060, and this citation was dismissed by the Kentucky Regulatory Authority. On August 6, 1986, the inspector issued CO No. 86-84-068-001 for mining without a valid surface disturbance permit from the Commonwealth (Exh. R-13).

Appellant filed an application for review and temporary relief from CO No. 86-84-068-001 and the matter was heard before Judge Miller in Lexington, Kentucky, on February 19, 1987. Judge Miller issued a decision on June 9, 1987, from which the appellant filed a timely appeal. 2/

In his decision, Judge Miller discussed and decided five issues in light of the evidence adduced at the hearing and applicable law. We agree with Judge Miller's findings and conclusions and adopt them as our own. A copy of his decision is attached.

[1] The first issue concerns OSMRE's authority for citing a violation of Kentucky law. Appellant concedes OSMRE's jurisdiction to cite violations of Federal law but challenges issuance of the CO insofar as it cited a violation of KRS 350.060, mining without a valid surface disturbance permit from the Kentucky Regulatory Authority. As the Judge observed, a state's jurisdiction for enforcing its regulatory program is primary, but not exclusive, and OSMRE may take enforcement action where a state has failed to act. The issue is well settled and the Judge's decision contains pertinent citations to SMCRA, regulations, and case law.

[2] Appellant's second argument is that OSMRE should be equitably estopped from enforcing SMCRA (i.e., issuing the CO) because it failed to take enforcement action until approximately 2 years after the site was reclaimed. Appellant alleges that he was misled because OSMRE, having failed to enforce its oversight responsibilities, thereby encouraged him to rely on the Commonwealth's decision that concluded his operation was within the 2-acre limitation.

Appellant has not demonstrated that the traditional elements of estoppel are present in this case. "A party claiming estoppel must have

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2/ On Feb. 5, 1988, the appellant filed a motion to strike OSMRE's brief in this case. The brief was due on Aug. 24, 1987, but was not received by the Board until Jan. 25, 1988. OSMRE alleges it timely mailed the brief but it never reached the Board. It is the general practice of the Board not to dismiss appeals or grant motions to strike where the requirements of the regulations have been met, albeit late, where good cause for the delay is shown and where no adverse effect on the parties has been established. Atlantic Richfield Co., 8 OHA 68 (1989). The appellant does not allege prejudice to his case or that he did not timely receive OSMRE's brief. The motion to strike is, therefore, denied.

relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" Heckler v. Community Health Services of Crawford, 467 U.S. 51, 59 (1984); Shelbiana Construction Co. v. OSMRE, 102 IBLA 19 (1988). Appellant demonstrates no reliance on OSMRE's conduct to his detriment. In this instance appellant reclaimed the minesite to the standard which would be acceptable under the 2-acre exemption (Tr. 28). During the Federal inspection it was determined that appellant had disturbed in excess of 2 acres, and thus, reclamation to the permanent program standards was required (Tr. 21). The record contains a series of photographs of the minesite taken by Inspector Rice on April 25, 1986, depicting an outslope spoil material area, a mining bench, and a highwall (Exhs. R-4 through R-7; Tr. 14-16). The CO was issued on August 6, 1986, less than 4 months later (Exh. R-13; Tr. 20). Thus, the record shows that the site had not been wholly reclaimed to the proper standard when OSMRE first inspected it, and that less than 4 months, not 2 years, elapsed between OSMRE's first inspection and its issuance of the CO. Appellant's suggestions that he was misled by OSMRE and that OSMRE acquiesced in his violation of the 2-acre limitation are unfounded.

[3] Appellant contends that the prior Kentucky proceeding, in which the citation for violation of KRS 350.060 was dismissed, and no appeal was taken by the State agency, renders the Federal action res judicata.

As the Judge found, citing Bernos Coal Co. v. OSMRE, 97 IBLA 285, 297, 94 I.D. 181, 188-89 (1987), rev'd, Bernos Coal Co. v. Hodel, Civ. No. 3-87-437 (E.D. Tenn. June 6, 1989), appeal filed, No. 89-6000 (6th Cir. Aug. 4, 1989):

> [T]he unique Federal/State balance created under SMCRA manifests a "countervailing statutory policy" and renders [the res judicata and collateral estoppel] doctrines inapplicable to issues arising in the Federal/State context. * * * [T]he Act requires [OSMRE] to ensure compliance with the law regardless of the actions or inactions of the state regulatory authority.

Although the Bernos decision has been reversed by the district court, we note that an appeal has been filed with the circuit court of appeals. We, therefore, continue to hold to that decision. 3/

3/ In Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984), in expressly declining to follow the decision of the U.S. District Court for Alaska in Oregon Portland Cement Co. v. United States Department of the Interior, 590 F. Supp. 52 (Alaska 1984), the Board stated:

"The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain."

In any event, even should SMCRA be found not to contain a "countervailing statutory policy" that would preclude the application of the res judicata and collateral estoppel doctrines, OSMRE would have little choice in a case such as the one before us other than to proceed with an enforcement action once a violation has been discovered. The plain language of the statute directs that:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health and safety of the public, or is causing, or can reasonably be expected to cause significant imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations. * * * Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated. [Emphasis added.]

30 U.S.C. § 1271(a)(2) (1982).

Congress has clearly directed the Secretary to proceed with corrective enforcement action whenever a violation is discovered by a Federal inspection. 4/ This requirement is replicated in the regulations promulgated to implement this section of the statute and contains similar mandatory language. 30 CFR 843.11(a)(1). It is likewise well settled that surface coal mining without a valid permit constitutes a condition which can reasonably be expected to cause significant imminent environmental harm. Firchau Mining, Inc. v. OSMRE, 101 IBLA 144 (1988).

The Judge's decision at pages 4 and 5 contains a thorough discussion of appellant's arguments and controlling law. Appellant has presented nothing to warrant disturbing the Judge's conclusion.

[4] Appellant argued before the Judge, and argues again on appeal that he was singled out for enforcement procedures, and was deprived of due process and equal protection under the U.S. Constitution. The Judge properly

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fn. 3 (continued)
We believe the same situation exists regarding the Bernos v. Hodel decision and respectfully decline to follow it for those same reasons.

We also believe that no purpose would be served by failing to rule on this case during the pendency of that litigation. Pacificorp, 95 IBLA 16, 17 (1986).

4/ This inspection, conducted under the auspices of the Kentucky Two-Acre Task Force Program (see Tr. 9), was mandated by the court-endorsed settlement of Save Our Cumberland Mountains, Inc. v. Donald P. Hodel, No. 81-2238 (D.D.C. June 7, 1985).

ruled that the Office of Hearings and Appeals is not the proper forum to decide constitutional questions. Gobel Bartley, 4 IBSMA 219, 89 I.D. 628 (1982).

[5] Appellant's final argument is that his mining operation did not exceed the 2-acre limitation and that the Judge erroneously evaluated the testimony and other evidence to conclude otherwise.

The relevant evidence is summarized in the Judge's decision at page 6. Three witnesses testified that the area disturbed was greater than 2 acres. Appellant testified on his own behalf that the area had been previously disturbed by other parties, but presented no evidence to refute the disturbed area estimates presented by the other witnesses.

OSMRE met its burden of presenting a prima facie case by presenting sufficient evidence to establish the essential facts that a violation occurred. See Coal Energy, Inc. v. OSMRE, 105 IBLA 385 (1988). The burden of proving entitlement to the 2-acre exemption, an affirmative defense, was on appellant. Fresa Construction Co. v. OSMRE, 106 IBLA 179, 187 (1988), and cases there cited. Appellant did not meet this burden.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Byrnes
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge.

June 9, 1987

Christopher C. Slone, Applicant	: Docket No. NX 6-104-R
v.	: Application for Review and Temporary Relief
Office of Surface Mining Reclamation and Enforcement, (OSMRE), Respondent	: Cessation Order No. 86-84-068-001

DECISION

APPEARANCES: James Bates, Esq., P.O. Box 404, Hindman, Kentucky for the applicant and Paul Molinar, Esq., Office of the Field Solicitor, U.S. Department of the Interior, P.O. Box 15006, Knoxville, Tennessee for the respondent.

BEFORE: Administrative Law Judge Miller

PROCEDURAL BACKGROUND

Pursuant to Section 525 of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. Section 1201 et. seq., Christopher C. Slone (Slone) filed an application for review and temporary relief from Cessation Order No. 86-84-068-001 issued by the respondent, the Office of Surface Mining Reclamation and Enforcement (OSMRE). OSMRE filed an answer and both parties took discovery. Other pleadings were filed.

Pursuant to notice, the matter was heard before the undersigned Administrative Law Judge on February 19, 1987, in Lexington, Kentucky. At hearing, applicant tendered 2 separate motions for summary judgment, which were taken under advisement. Both parties filed post-hearing briefs, which have been considered in rendering this decision. Where appropriate, portions of the briefs may be incorporated herein without attribution.

FACTUAL BACKGROUND

Applicant conducted coal mining activities pursuant to a 2 acre or less surface disturbance permit issued by the State of Kentucky on April 15, 1983 (Exh. R-1). The permit did not require applicant to comply with the permanent program performance standards of the Act.

On April 25, 1986, OSMRE Inspector Lavern Rice, as part of his job with OSMRE's 2 acre task force, visited Slone's minesite (Tr. 11). He was accompanied by 2 state inspectors and 2 OSMRE inspectors (Tr. 12). The inspector

conducted a field survey, prepared a sketch and map of the site, and calculated the disturbed area as 2.7298 acres (Tr. 13; Exh. R-2).

Based on the inspection, on June 9, 1986, Inspector Rice issued a ten-day notice to the State of Kentucky citing violation of KRS 350.060 and Section 502(b) of the Act, for mining without a valid surface disturbance permit from the Kentucky Regulatory Authority (Tr. 17, 18; Exh. R-8). The Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE) regional administrator responded that no further action would be taken against Slone because the State had previously issued a non-compliance for violation of KRS 350.060, a failure to abate cessation order was issued, and the non-compliance and cessation order were dismissed after a preliminary hearing on September 23, 1985 (Exh. R-9).

On June 25, 1986, Inspector Rice conducted another inspection, and issued Cessation Order No. 86-84-068-001 citing Slone for mining without a valid surface disturbance permit from the state (Exh. R-13).

ISSUES

1. Does OSMRE have jurisdiction to enforce the Act at the Slone site.

2. Is OSMRE equitably estopped from enforcing the Act.

3. Do the preclusion doctrines of collateral estoppel and res judicata bar the issuance of Cessation Order No. 86-84-068-001.

4. Does the constitutional principle of equal protection prevent OSMRE from enforcing the Act.

5. Was Cessation Order No. 86-84-068-001 validly issued.

DISCUSSION

Issue No. 1

In one of his motions for summary judgment, applicant argues that respondent did not have jurisdiction to issue the cessation order because Kentucky had obtained primacy and applicant could not be cited by federal authorities for mining without a valid state permit.

During the permanent phase of the implementation of the Act, a state may assume primary jurisdiction over the regulation of surface coal mining on non-federal lands within its borders through submission to and approval by the Secretary of the Interior of its proposed state program. Kentucky received conditional approval of its state program on May 18, 1982. 42 FR 21404 (May 18, 1982). When a state program is approved, that state assumes

responsibility for issuing permits and for enforcing the provisions of its regulatory program. A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. 1/

In S & S Coal Co. v. OSMRE, 2/ an OSMRE inspector issued a cessation order to S & S Coal Company after determining that the company was mining without a permit from the State of Kentucky. The Interior Board of Land Appeals held that the inspector acted properly, as 30 CFR 843.11(a)(2) authorizes issuance of a cessation order where an operator is conducting surface coal mining and reclamation operations without a valid surface coal mining permit. Clearly, the case law and regulations mandate that the federal regulatory authority issue a cessation order when it concludes that the operator has not complied with state permit requirements.

In the same vein, applicant contends that OSMRE has jurisdiction to issue a cessation order only when a state fails to take enforcement action, and in the instant case, DSMRE had taken enforcement action prior to the issuance of the cessation order. The regulations at 30 CFR 843.12(a)(2) govern OSMRE's course of action when a state fails to take "appropriate action" under Section 521(a) of the Act. The regulation is clear that OSMRE may issue a cessation order if the state fails to take appropriate action in response to a ten-day notice. In the instant case, DSMRE responded that it would not take further action.

In several recent decisions, the Interior Board of Land Appeals has held that when a state regulatory authority determines that upon receipt of a ten-day notice, no enforcement action is necessary as a matter of state law, OSMRE may conclude that the state involved has not taken "appropriate action to ensure abatement of the violation" under Section 521(a) of the Act, and may take appropriate enforcement action. 3/

Issue No. 2

In a motion for summary judgment tendered at hearing, applicant argued that respondent is estopped from issuing the cessation order because OSMRE failed to inspect the site or take enforcement action until approximately 2 years after the site was reclaimed. Applicant's position is that since OSMRE failed to inspect and issue a cessation order in a timely manner, OSMRE cannot require it to comply with the terms of the Act.

1/ Bannock Coal Co. v. OSMRE, 93 IBLA 225 (1986); Turner Brothers, Inc., v. OSMRE, 92 IBLA 320 (1986).

2/ S & S Coal Co., 87 IBLA 350 (1985).

3/ Shamrock Coal Co. v. OSMRE, 81 IBLA 374, (1984), app. filed, Shamrock Coal Co. v. Clark, No. 84-328 (E.D. Ky., July 27, 1984); Bannock Coal Co. v. OSMRE, 93 IBLA 225 (1986).

In Renewable Energy, Inc., 67 IBLA 304, 89 I.D. 496 (1982), the Board held that estoppel will not lie against the United States where there is no evidence of an affirmative misrepresentation or an affirmative concealment of a material fact by the government and the party asserting the estoppel cannot claim ignorance of the true facts because the facts are a matter of public record. In the instant case, there is no indication that OSMRE made any mispresentations or concealed any material facts in its dealings with Slone. Additionally, the 2 acre regulations are a matter of public record, and it is a well settled principle of law that all persons dealing with the government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

Issue No. 3

In a motion for summary judgment received by this office on February 18, 1987, applicant contends that this action is res judicata and barred by collateral estoppel because DSMRE acted for and on behalf of the respondent in the prior state proceeding. Slone testified that he received a non-compliance and cessation order from the state in 1985 (Tr. 68, 69). The record indicates that a hearing was held, the hearing officer dismissed both citations, and the Natural Resources and Environmental Protection Cabinet did not appeal the decision (Exh. R-9; applicant's motion for summary judgment).

Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Montana v. U.S., 440 U.S. 147, 153, 99 S Ct. 970, 973, (1979). The doctrine of collateral estoppel provides that once an issue is actually litigated and necessarily determined, the determination is conclusive in a subsequent suit based on a different cause of action but involving a party or privy to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, n. 5, 99 S. Ct. 645, 649, n. 5 (1979).

In a recent decision, Bernos Coal Co. and Excello Land and Mineral Corp. v. OSMRE, 4/ the Interior Board of Land Appeals addressed the principles of res judicata and collateral estoppel. In Bernos, a state permit was issued in 1978 under the initial regulatory program. OSMRE inspected the site in 1981 and issued a notice of violation and subsequent failure to abate cessation order, which was appealed by the permittee and contract miner. The Tennessee Department of Surface Mining issued 2 state notices of violation in 1983. The Tennessee Board of Reclamation vacated the violation and issued an order declaring the permit area to be reclaimed and releasing the reclamation bond. Based on this action by the Tennessee Board, the permittee and contract miner argued that the doctrines of res judicata and collateral estoppel barred OSMRE from enforcing the notice of violation and cessation order.

4/ 97 IBLA 285 (1987).

The Board examined the Act, and addressed the preclusion doctrines of res judicata and collateral estoppel, determining that the "unique Federal/State balance created under SMCRA manifests a 'countervailing statutory policy' and renders those doctrines inapplicable to issues arising in the Federal/State context." The Board noted that the Act requires OSMRE to ensure compliance with the law regardless of the actions or inactions of the state regulatory authority.

Although the notice of violation and cessation order at issue in Bernos were issued by OSMRE during the initial regulatory program, and the state subsequently obtained primacy and issued a state notice of violation which was litigated before a state agency, the Board noted that application of the preclusion doctrines is inconsistent with OSMRE's enforcement responsibility during the permanent regulatory program as well.

The same conclusion maybe reached without reference to the Bernos decision, as one of the prerequisites for the application of the preclusion doctrines is missing. There is no privity between OSMRE and the Kentucky DSMRE. The DSMRE was not OSMRE's virtual representative during the state proceeding, so OSMRE was not privy to the action. The U.S. Supreme Court, in U.S. v. Mendoza, 464 U.S. 154 (1984), reaffirmed its analysis in Montana v. U.S., which established the degree of mutuality required of the Federal government as a party litigant in a prior litigation. The Court held that before a party may seek collateral estoppel against the Federal government where the Federal government was not a named party in the prior litigation, it must show that the Federal government was a "party" in all but a technical sense. In the instant case, applicant did not present evidence to establish that respondent was involved with the state administrative proceedings, or that respondent financed the prior litigation.

Issue No. 4

Applicant asserts that OSMRE has singled out for enforcement the permittees of 2 acre permits, and is treating such permittees differently than those operating under permits for over 2 acres. Consequently, applicant argues that his constitutional rights under the equal protection clause and his civil rights have been violated.

Since applicant is basing his argument on a constitutional provision, his proper recourse is through the Federal courts. This tribunal is an instrumentality of the Executive Branch, bound by Federal law, and is not the proper forum to determine constitutional issues. 5/

5/ Amanda Coal Co., 87 I.D. 643 (1980); Gobel Bartley, 89 I.D. 628 (1982).

Issue No. 5

As a result of a survey conducted on April 25, 1986, Inspector Rice calculated a total disturbed area of 2.7298 acres (Tr. 13; Exh. R-2). The field survey conducted by the inspector did not include the gas works area, the road leading to the gas works, or the cemetery, and all areas included in the survey appeared to be disturbed contemporaneously with the mining (Tr. 14, 42). The inspector estimated coal removal of 9,059 tons (Tr. 17). Respondent's witness, Paul Nesbitt, surveyed the site for OSMRE on February 4, 1987. Inspector Rice pointed out the boundaries, and using the theodolite method, Mr. Nesbitt concluded that a total of 3.27 acres had been disturbed (Tr. 48, 49). He stated that the area included in the survey appeared to belong to the same mining operation, and included the bench, slide area, and haul road (Tr. 50, 51).

Mr. Slone testified on his own behalf. He stated that the area was previously disturbed by prospectors and by the gas company (Tr. 59). Additionally, the gas well operators disturbed an area 50 feet above the old access road (Tr. 53). Mr. Slone stated that he mined just over 1500 tons of coal, and 1.88 acres were disturbed (Tr. 66, 70). The disturbed area included the haul road and part of the slope (Tr. 70). In Mr. Slone's opinion, he was charged with violation of the regulation because he had performed reclamation work on 2 different occasions, and OSMRE included the prior reclaimed area in its survey (Tr. 71).

In rebuttal, OSMRE called Mr. William Owens, a Kentucky state reclamation inspector who was on the site during the course of Slone's mining operation. To the best of his knowledge, the old road was covered when the slopes were dressed down from the spoil on the outslope as part of the mining operation (Tr. 78). Inspector Owens paced the site in 1985, determined that the disturbed area was 2.5 acres, and issued the state non-compliance (Tr. 88, 89).

In a Section 521 hearing, respondent OSMRE has the burden of establishing a prima facie case as to the validity of the notice or order, 6/ and the applicant has the ultimate burden of persuasion. In the instant case, Inspector Rice, Mr. Nesbitt and Mr. Owens testified that the disturbed area was over 2 acres. Applicant testified on his on behalf, did not present any witnesses, and did not provide documents or photographs to rebut OSMRE's prima facie case as to the fact that 2 acres or more were disturbed.

6/ 43 CFR 4.1171; James Moore, 1 IBSMA 216, 86 I.D. 369 (1979).

CONCLUSION

Despite the fact that the State of Kentucky has obtained primacy, OSMRE has authority to inspect and enforce the Act at Slone's minesite.

OSMRE is not equitably estopped from enforcing the Act, nor do the preclusion doctrines of res judicata and collateral estoppel bar issuance of the cessation order.

This court does not have jurisdiction to determine constitutional issues.

Based on the previous discussion, I find that Cessation Order No. 86-84-068-001 was validly issued and it is hereby affirmed.

This decision may be appealed in accordance with the applicable provisions contained in 43 CFR Subtitle A, Part 4, Subpart L, Sections 4.1100 through 4.1296, Special Rules Applicable to Surface Coal Mining Hearings and Appeals.

Frederick A. Miller
Administrative Law Judge